

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
SOUTHERN DIVISION
NO. 7:96-CR-62-2H

UNITED STATES OF AMERICA)
)
)
V.)
)
MARK CLIFTON)

ORDER

This matter is before the court on defendant's motion for a writ of error coram nobis. The government responded by filing a motion to dismiss, and defendant responded to the motion to dismiss. Additionally, defendant has filed a motion for appointment of counsel.

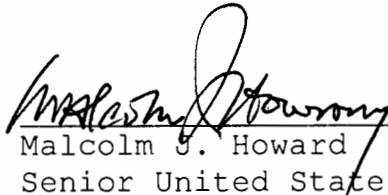
A writ of error coram nobis is only available "to those petitioners who are no longer in custody pursuant to their convictions." United States v. Tate, 521 F. App'x 252, 252 (4th Cir. 2013 (unpublished), (citing Carlisle v. United States, 517 U.S. 426, 428-29 (1996))). As the defendant is currently in federal custody, he cannot obtain relief pursuant to this writ.

Defendant, in his response, claims that he is moving in the alternative for a writ of audita querela. However, defendant's motion is tantamount to a successive motion under 28 U.S.C.

§ 2255, over which this court lacks jurisdiction. (D.E. #84). A writ of audita querela is not available when other remedies exist, such as a motion to vacate pursuant to 28 U.S.C. § 2255. This availability does not change even considering that defendant can only proceed under § 2255 by seeking authorization from the circuit court. United States v. McRae, 359 Fed. App. 399 (4th Cir. 2009)(unpublished), (citing Carrington v. United States, 503 F.3d 888, 890 (9th Cir. 2007)) ("[T]he statutory limits on second or successive habeas petitions do not create a 'gap' in the post-conviction landscape that can be filled with the common law writs.").

Therefore, this court lacks jurisdiction in this matter. The motion to dismiss is GRANTED, defendant's motion is DENIED, and the motion for appointment of counsel is DENIED as moot.

This 15TH day of April 2014.


Malcolm J. Howard
Senior United States District Judge

At Greenville, NC
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